Industrial Concrete Products Bhd v Concrete Engineering Products Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5–22–370 OF 1996
JAMES FOONG J
5 MARCH 2001

Companies and Corporations *— Directors — Authority — Management agreement — Whether a single director has authority under the articles of association to enter into management agreement — Whether there is implied or otensible authority — Whether management agreement entered into was authorized*

Companies and Corporations *— Directors — Fiduciary duties — Breach of — Creation of management agreement — Director did not act bona fide in the interest of company — Director acting beyond his power — Liability to account to company for all breaches and profits derived from breaches*

Companies and Corporations *— Directors — Fiduciary duties — Trusteeship — Whether there was breach of constructive trust in dealings leading to the management agreement*

Contract *— Conditional contract — Condition precedent to formation of contract — Approval of MITI not obtained — Agreement lapsed by effluxion of time — No agreement as condition precedent not fulfilled*

Wong Kong Nam ('Wong') was the founder and substantial shareholder of CEPCO. He held the position of managing director in the company and was aided by a board of directors. The next most senior executive in the company was Ang Yeow Hwa ('Ang'). He was in charge of production. The core business of CEPCO was manufacturing and sales of pre-stressed spun concrete piles and poles in Malysia. CEPCO held 25% market share of this business in this country. It closest rival was ICP, which commanded 65% of the market share. The managing director of ICP was Lim Yong Kiat ('Lim'). In the early part of 1996, a group of corporate takeover adventures headed by Repco Low offered to purchase Wong's controlling interest in CEPCO. The go-in-between for this deal was Tay Way Bok. Once the purchases were completed, Repco Low installed Choo Chin Thye ('Choo') as his nominee in CEPCO. Choo was made a director of CEPCO as well as a mandatory signatory to the company's banking instruments. In March 1996 Choo, through Tay Way Bok, met up with Lim. At this meeting, Choo indicated to Lim that the group whom he represented was the majority shareholders of CEPCO. Since ICP was in the same line of business as CEPCO, Choo proposed to ICP to acquire CEPCO's core business. The parties agreed that ICP would manage the production and marketing of CEPCO's core business. At the invitation of Choo, on 25 April 1996 Lim with various personnel from ICP moved into the office of CEPCO in Kuala Lumpur and within days had taken over the three factories of the company engaged in the core business

located around the country. All these took place while, Ang was on holiday in China. A board of directors meeting of CEPCO was called on 9 May 1996. What exactly was spoken at this meeting and the resolutions passed were hot topics of contention between the parties in this case. However all agreed that the principle issue centred on the appointment of ICP to take over the management of CEPCO core business. According to Choo, at this meeting, the board of CEPCO ractified his decision to appoint ICP to be the manager of production and sales of CEPCO's core business. Ang and another member of the board of director, Tan Sri Stephen, strenuously denied this. They argued that no resolution was ever passed to approve this appointment. They stressed that the management agreement containing the terms and conditions of ICP's appointment was not even adduced to the board members at this meeting for consideration. Under such circumstances, they claimed that the board could never have ractified the act of Choo to appoint ICP as manager. On 5 June 1996 without reference or approval to the board of CEPCO, Choo executed the management agreement for and on behalf of CEPCO. Lim signed for ICP. On the same date as the management agreement was signed, Choo for and on behalf of CEPCO executed two other documents, namely a letter of intent and a letter of implementation by CEPCO to ICP which declared that pending the approval of the management agreement by MITI, CEPCO allowed ICP to manage the core business of CEPCO. In this present action, ICP claimed from CEPCO, inter alia, for a declaration that the management agreement was valid and in full force. CEPCO's defence to ICP's claim was that the management agreement, being a conditional agreement requiring MITI's approval, had lapsed and became unenforceable since this condition was not fulfilled within the stipulated time. Further, it was submitted that the management agreement did not bind CEPCO as Choo lacked authority, both from the board of directors and shareholders of CEPCO and this was known or ought to have been known to ICP.

Held:

(1) Article 116 of the articles of association of CEPCO specifies that 'The business of the Company shall be managed by the Directors'. By this, it must be considered to mean the board of Directors of CEPCO and not a single director. Choo was only an ordinary director of CEPCO. He had not been appointed by the board to any special position nor did the board pass any resolution prior to 9 May 1996 to clothe him with any special powers to enter into any arrangement with ICP to take over management of CEPCO's core business. What he did before this date was entirely his own. Without any mandate from the board, and when the board, who had the right under art 116 of the articles of association of CEPCO to manage the affairs of the company, had not given him any special powers, then Choo did not have actual

authority to enter into the management agreement with ICP (see pp 348G, 349B–C).

(2) The representation that Choo had authority to enter into the management agreement came mainly from the acts and deeds of Choo himself. He had represented to ICP that he had the mandate to represent CEPCO on the matter. Besides this, the acts and deeds of CEPCO's staff and the board itself also contributed to such representation. The court found that the four conditions as stated in *Woodland Development Sdn Bhd v Chartered Bank; PJT & Densun (M) Sdn Bhd (Third Party)* [1986] 1 MLJ 84 had been fulfilled and thus Choo had apparent or ostensible (including implied) authority from CEPCO to enter into the management agreement (see pp 352C–D, 354H).

(3) Since Choo had authority to enter into the management agreement for the purpose of attaching liability to the principal for acts of his agent, the issue relating to trespass by ICP on CEPCO's property would be a non-issue. Therefore the court found that ICP was not a trespasser on CEPCO's property (see pp 355I–356A).

(4) Since MITI's approval had not been obtained the condition precedent of the management agreement was not fulfilled to give effect to the contract. And by effluxion of time, this agreement had lapsed (see p 358A).

(5) The court found that Choo had not acted bona fide in the interest of CEPCO and neither did he promote and advance CEPCO's interest nor considered the relevant facts before committing the acts as alleged. His entire action throughout this period as a director was solely towards the benefit and interest of the group that nominated him to the board. Such interest not only conflicted with those of CEPCO but was also disastrous to CEPCO. For this, Choo was guilty of breach of his fiduciary duty (see p 361A–C).

(6) Choo had acted beyond his power as a director of CEPCO in dealing with the company's assets and thus had committed a breach of trust to CEPCO. For this he was liable to account to CEPCO all benefits and profits derived from this breach (see p 361F).

(7) From the evidence adduced, the court did not found Lim and consequently ICP being dishonest in his dealings in this transaction. Thus the court found that Lim and consequently ICP had not committed any breach of constructive trust accused of. For this, CEPCO's claim against both Lim and ICP on this cause of action must fail (see p 364D, 365F).

(8) The court found that no common intention existed between Lim and ICP, on the one hand with Choo to effect any unlawful purpose or to do a lawful act by unlawful means resulting in

injuries to CEPCO. Choo did possess an unlawful purpose and/or did a lawful act by unlawful means but this was not shared by Lim or ICP. They entered into this transaction primarily as a business venture which they felt was advantageous and beneficial to their own commercial concern. This was entirely acceptable since they were men of commerce (see p 367B–C).

[**Bahasa Malaysia summary**

Wong Kam Nam ('Wong') adalah pengasas dan pemegang saham yang banyak di CEPCO. Beliau memegang jawatan sebagai pengarah urusan di dalam syarikat tersebut dan dibantu oleh lembaga-lembaga pengarah. Selepas beliau, eksekutif yang paling kanan dalam di syarikat adalah Ang Yeow Hwa ('Ang'). Beliau menguruskan pengeluaran. Perniagaan asas CEPCO adalah mengeluarkan dan penjualan cerucuk dan tiang konkrit yang telah diuji. CEPCO menguasai 25% pasaran perniagaan ini di dalam negara. Lawannya yang terdekat ICP, menguasai 65% pasaran. Pengarah Urusan ICP adalah Lim Yong Kiat ('Lim'). Di awal 1996 sekumpulan pengambilalihan korporat yang didahului oleh Repco Low menawar untuk membeli kepentingan Wong di dalam CEPCO. Pengantara urusan ini adalah Tay Way Bok. Selepas pembelian-pembelian ini telah diselesaikan, Repco telah melantik Choo Chin Thye ('Choo') sebagai penamanya di dalam CEPCO. Choo telah dijadikan pengarah CEPCO dan juga sebagai penandatangan mandatori kepada instrumen perbankan syarikat. Pada bulan Mac 1996 Choo , melalui Tay Way Bok, bertemu dengan Lim. Di pertemuan tersebut Choo memberitahu Lim bahawa kumpulan yang beliau wakili adalah pemegang saham majoriti CEPCO. Oleh kerana ICP adalah di dalam perniagaan yang sama dengan CEPCO, Choo mencadangkan kepada ICP untuk membeli perniagaan asas CEPCO. Di atas pelawaan Choo, pada 25 April 1996 Lim dengan pelbagai wakil dari ICP berpindah ke pejabat CEPCO di Kuala Lumpur dan dalam beberapa hari telah mengambil alih ketiga-tiga kilang syarikat yang berkaitan dengan perniagaan asas yang terletak di dalam negara. Kesemua ini berlaku semasa Ang bercuti di China. Suatu mesyuarat lembaga pengarah CEPCO telah dipanggil. Di mesyuarat ini dan resolusi-resolusi yang diluluskan adalah topik-topik hangat yang ditegaskan oleh pihak-pihak di dalam kes. Namun kesemua bersetuju bahawa isu utama berpusat kepada perlantikan ICP untuk mengambil alih pengurusan perniagaan asas CEPCO. Ang dan seorang lagi ahli lembaga pengarah, Tan Sri Stephen, dengan tegas menafikannya. Mereka menghujahkan bahawa tiada resolusi telah diluluskan untuk meluluskan perlantikan ini. Mereka menegaskan bahawa perjanjian pengurusan yang mengandungi terma-terma dan syarat-syarat perlantikan ICP tidak dikemukakan kepada ahli-ahli lembaga pengarah di mesyuarat ini untuk pertimbangan. Di dalam keadaan sedemikian, mereka mendakwa bahawa lembaga tidak mungkin

membenarkan tindakan Choo untuk melantik ICP sebagai pengurus. Pada 5 Jun 1996 tanpa rujukan atau kebenaran lembaga CEPCO Choo telah menandatangi perjanjian pengurusan untuk dan bagi pihak CEPCO. Lim telah menandatangani untuk ICP. Pada hari yang sama di mana perjanjian pengurusan telah ditandatangani, Choo bagi pihak CEPCO telah menandatangani dua dokumen-dokumen yang lain, iaitu suatu surat niat dan surat implementasi oleh CEPCO kepada ICP yang mengisytiharkan bahawa sehingga kelulusan perjanjian pengurusan oleh MITI, CEPCO membenarkan ICP untuk menguruskan perniagaan asas CEPCO. Di dalam tindakan ini ICP menuntut daripada CEPCO, antara lain, suatu deklarasi bahawa perjanjian pengurusan adalah sah dan berkuatkuasa penuh. Pembelaan CEPCO kepada tuntutan ICP adalah bahawa perjanjian pengurusan, merupakan suatu perjanjian bersyarat yang memerlukan kelulusan MITI, telah luput dan menjadi tidak boleh dikuatkuasakan oleh kerana syarat ini tidak dipenuhi di dalam masa yang diperuntukkan. Selanjutnya, ia adalah dihujahkan bahawa perjanjian perniagaan tersebut tidak mengikat CEPCO oleh kerana Choo tiada kuasa, dari kedua-dua lembaga pengarah-pengarah dan pemegang-pemegang saham CEPCO dan ini diketahui atau sepatutnya diketahui kepada ICP.

Diputuskan:

(1) Perkara 116 Perkara-perkara Persatuan CEPCO menyatakan bahawa 'Urusan Syarikat akan diuruskan oleh Pengarah-pengarah'. Dengan ini, ia mestilah diperlihat sebagai bermaksud Lembaga-lembaga Pengarah CEPCO dan bukan hanya seorang pengarah. Choo hanyalah pengarah yang biasa di CEPCO. Beliau tidak dilantik oleh pengarah ke sebarang kedudukan istimewa atau Lembaga meluluskan sebarang resolusi sebelum 9 Mei 1996 untuk memberikannya sebarang kuasa khas untuk memasuki suatu aturan dengan ICP untuk mengambilalih pengurusan perniagaan asas CEPCO. Apa yang beliau buat sebelum tarikh ini adalah keputusannya sepenuhnya. Tanpa sebarang mandat daripada Lembaga, dan apabila Lembaga tersebut, yang mempunyai hak di bawah per 116 Perkara-perkara Persatuan CEPCO untuk menguruskan hal ehwal syarikat, tidak memberikannya sebarang kuasa-kuasa khas, maka Choo tidak mempunyai kuasa sebenar untuk memasuki perjanjian pengurusan dengan ICP (lihat ms 348G, 349B–C).

(2) Representasi bahawa Choo mempunyai kuasa untuk memasuki perjanjian pengurusan timbul daripada tindakan dan perbuatan Choo sendiri. Beliau telah merepresentasikan kepada ICP bahawa beliau mempunyai mandat untuk mewakili CEPCO di atas perkara tersebut. Selain itu, tindakan-tindakan dan perbuatan kakitangan CEPCO dan lembaga itu sendiri menyumbang kepada representasi tersebut. Mahkamah mendapati empat syarat-syarat seperti yang dinyatakan di

dalam *Woodland Development Sdn Bhd v Chartered Bank; PJT & Densun (M) Sdn Bhd (Third Party)* [1986] 1 MLJ 84 telah dipenuhi dan dengan itu Choo mempunyai kuasa zahir (termasuk tersirat) daripada CEPCO untuk memasuki perjanjian pengurusan (lihat ms 352C–D, 354H).

(3) Oleh kerana Choo mempunyai kuasa untuk memasuki perjanjian pengurusan bagi tujuan mengaitkan liabiliti kepada prinsipal bagi tindakan-tindakan ejennya, isu berkenaan pencerobohan oleh ICP ke atas harta tanah CEPCO bukanlah suatu isu. Maka mahkamah mendapati bahawa ICP bukanlah penceroboh ke atas harta tanah CEPCO (lihat ms 355I–356A).

(4) Oleh kerana kelulusan MITI belum lagi diperolehi, syarat terdahulu perjanjian pengurusan tidak dipenuhi bagi memberi kesan kepada kontrak. Dan dengan perjalanan masa, perjanjian ini telah luput (lihat ms 358A).

(5) Mahkamah mendapati bahawa Choo tidak bertindak secara bona fide bagi kepentingan CEPCO dan beliau juga tidak membangkitkan atau mengutarakan kepentingan CEPCO atau mempertimbangkan fakta-fakta yang relevan sebelum melakukan tindakan-tindakan yang dinyatakan. Tindakan keseluruhannya sepanjang tempoh ini sebagai pengarah hanyalah bagi kebaikan dan kepentingan kumpulan tersebut yang melantiknya ke lembaga. Kepentingan sedemikian bukan hanya bercanggah dengan kepentingan CEPCO tetapi juga memudaratkan CEPCO. Untuk ini, Choo adalah bersalah kerana ingkar kewajipan fidusiarinya (lihat ms 361A–C).

(6) Choo telah bertindak di luar bidang kuasanya sebagai pengarah CEPCO di dalam menguruskan aset-aset syarikat dan dengan itu telah melakukan pecah amanah kepada CEPCO. Untuk ini beliau bertanggungan untuk memberikan laporan kepada CEPCO segala kebaikan dan keuntungan yang diperoleh melalui pemecahan ini (lihat ms 361F).

(7) Daripada keterangan yang dikemukakan, mahkamah tidak mendapati Lim dan dengan itu ICP tidak jujur di dalam urusannya di dalam transaksi ini. Dengan itu mahkamah mendapati Lim dan dengan itu ICP tidak melakukan sebarang pemecahan amanah konstruktif yang dikatakan. Untuk ini, tuntutan CEPCO terhadap Lim dan ICP untuk kausa tindakan ini mestilah gagal (lihat ms 364D, 365F).

(8) Mahkamah mendapati tiada niat bersama telah wujud antara Lim dan ICP dengan Choo untuk melakukan sebarang tujuan yang menyalahi undang-undang atau melakukan sesuatu yang sah dengan cara yang menyalahi undang-undang menyebabkan kerugian kepada CEPCO. Choo mempunyai tujuan menyalahi undang-undang dan/atau melakukan tindakan dengan cara yang menyalahi undang-undang tetapi ini tidak dikongsi oleh Lim atau ICP. Mereka memasuki transaksi ini semata-mata sebagai

perniagaan usahasama yang mereka berpendapat sebagai menguntungkan atau memberi kebaikan kepada perniagaan mereka sendiri. Ini boleh diterima secara sepenuhnya oleh kerana mereka adalah ahli perniagaan (lihat ms 367B–C).]

Notes

For cases on directors generally, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 115–260.

For cases on conditional contract, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2292–2300.

Cases referred to

Barden Delvaux & Lecuit v Societe Generale [1992] 4 All ER 385 (refd)
Barnes v Andy (1874) LR 9 Ch App 244 (refd)
Belmont Finance Corp v William Furniture Ltd (No 2) [1980] 1 All ER 393 (refd)
Blackwell v Moray [1991] 5 ACSR 255 (refd)
Freeman & Lockyer v Buckhurst Park Properties (Mangel) Ltd & Anor [1964] 1 ALL ER 630 (refd)
Gasing Heights Sdn Bhd v Aloyah Abd Rahman & Ors [1996] 3 CLJ 695 (refd)
Kumagai Gumi Co Ltd v Zenecon Pte Ltd & Ors [1995] 2 SLR 297 (refd)
Land Allotment Co, Re (1894) 1 Ch 616 (refd)
Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 AMR 1666 (refd)
Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors [1994] 2 SLR 282 (refd)
Northside Development Pty Ltd v Registrar-General & Ors [1993] All ER 385 (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & 12 Ors [1998] 1 AMR 169 (refd)
Rajabali Jumabhoy v Ameerali R Jumabhoy [1997] 3 SLR 802 (refd)
Royal British Bank v Turquand (1856) 119 All ER 474 (refd)
Royal Brunei Airlines Sdn Bhd v Tan Kok Ming [1995] 3 MLJ 74 (refd)
SAL Industrial Leasing Ltd v Hydtrolmech Automation Services Pte Ltd & Ors [1998] 1 SLR 702 (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (refd)
Woodland Development Sdn Bhd v Chartered Bank; PJT & Densun (M) Sdn Bhd (Third Party) [1986] 1 MLJ 84 (folld)

Legislation referred to

Companies Act 1965 s 132C

Siew Yew Ming (*Siew Yeow Wan* with him) (*Raja Eleena Siew Ang & Assoc*) for the plaintiff.

Cecil Abraham (*Prasad Abraham* with him) (*Prasad Abraham & Assoc*) for the defendant.

N Navaratnam (*Saheran Woon N Navaratnam & Co*) for the second defendant in the defence to counterclaim.

Teh Boon Eng (*Teh & Assoc*) for the third defendant in the defence to counterclaim.

GK Ganesan (*Ganesan Ros Rokiah & Co*) for the sixth defendant in the counterclaim to counterclaim.

James Foong J. : The disputes in this case involve boardroom intrigues, corporate takeovers and commercial wrestles between competing individuals, business rivals and market adventurers. In order to understand the claims, counterclaims and claims to counterclaims of the parties to this suit, it is necessary to begin with the chronology of events that occurred between the early part of January of 1996 till approximately September of that year to a corporation known as Concrete Engineering Products Bhd ('CEPCO').

CEPCO is listed on the second board of the Kuala Lumpur Stock Exchange ('KLSE'). Its founder and substantial shareholder was one Wong Kong Nam ('Wong'). He held the position of managing director in the company and was aided by a board of directors. The next most senior executive in the company was one Mr Ang Yeow Hwa ('Ang'). He was in charge of production. The core business of CEPCO ('core business') is, and, at all material time was, manufacturing and sales of pre-stressed spun concrete piles and poles in Malaysia. Before the episode began, CEPCO held 25% of the market share of this business in this country. It closest rival was another corporation, the Industrial Concrete Products Bhd ('ICP'), which commanded 65% of the market share. The managing director of ICP was one Lim Yong Kiat ('Lim').

To control CEPCO, Wong, by himself, his family and nominees, held around 50% of the issued and paid up shares in the company. These included 19% moratorium shares possessed by a private limited company known as Progressive Metal Works Sdn Bhd ('Progressive') in CEPCO.

In the early part of 1996, a group of corporate takeover adventurers headed by a person known as Low Thean Hock ('Repco Low', as one of the witnesses addressed him) offered to purchase Wong's controlling interest in CEPCO. The go-in-between for this deal was a person with some experience in finance and corporate takeovers called Tay Way Bok ('Tay Way Bok'). The payment for Wong's block of shares, this court was told, amounted to a staggering sum of RM120m, roughly pricing each CEPCO share at approximately RM8.

To complete this deal, Repco Low and associates had to purchase from another substantial shareholder in CEPCO called Dato Fasir Samsuddin ('Dato Fasir') some shares in CEPCO. By this sale, dated 19 January 1996, Dato Fasir's shareholding in CEPCO was reduced to 12.5% from approximately 20%.

Once these purchases were completed, Repco Low installed one Choo Chin Thye ('Choo') as his nominee in CEPCO. Choo, who had legal

training (having been called to the Malayan Bar, and joined the corporate sector thereafter) was made a director of CEPCO on or about 22 January 1996 as well as a mandatory signatory to the company's banking instruments.

In a board meeting of CEPCO, held on the 8 February 1996, and chaired by Choo, two other nominees of Repco Low: Raja Zainal Abidin and Dato Mustaffa Mohd were made directors of CEPCO. The resolution recorded of this meeting reveals: the resignation of two former directors before Raja Zainal Abidin and Dato' Mustaffa Mohd were accepted; and the relinquishment by Wong of his managing directorship in CEPCO. He however remained as an ordinary director on the board, together with two other directors of the former board who did not resign: Tan Sri Amar Stephen Young ('Tan Sri Stephen') and En Hamidun Masuod ('Hamidun').

In March 1996, Choo, through Tay Way Bok, met up with Lim. At this meeting, Choo indicated to Lim that the group whom he represents was the majority shareholders of CEPCO. They have a corporate plan for a reverse takeover of CEPCO by the State Economic Development Corporation of Sabah ('SEDC') who would inject into CEPCO a clinker plant. By this process, the core business of CEPCO would no longer fit into the corporate program and should be sold. Since ICP was in this same line of business as CEPCO, Choo proposed to ICP to acquire CEPCO's core business.

Lim was interested in this business proposition. After consulting ICP's principal shareholder, negotiations with Choo began. From an initial suggestion to corporatize the core business of CEPCO, with ICP taking over management of it with 40% equity participation, and an option to purchase the remainder, the parties finally settled on the following: ICP would manage the production and marketing of CEPCO's core business (which was to be turned into a division of CEPCO) for a fee over a period with an option to purchase the assets and goodwill of this business at a subsequent date. The outline of this arrangement was set out in a concept paper prepared by Lim.

When the agreement was reached, the parties, on 24 April 1996 proceeded to M/s Adnan, Sundra & Low, a firm of advocates and solicitors experienced in company law, to formalize the transaction. Lim's concept paper was handed over to the lawyers as a basis to draft the relevant legal documents.

At the invitation of Choo, on 25 April 1996 Lim with various personnel from ICP, moved into the office of CEPCO in Kuala Lumpur, and within days had taken over the three factories of the company engaged in the core business located around the country. Besides acquiring the physical assets of CEPCO's core business, ICP also cancelled some purchase orders given to CEPCO and requested these customers to reissue similar orders to ICP.

All these took place while Ang, the most senior executive of CEPCO, and who is now also a director of the company, was on holiday in China. Upon his return on 3 May 1996, he was shocked to learn of what had happened. To his disgust, he discovered that his office in CEPCO was

intruded and files removed. Also discovered was a letter dated 26 April 1996 addressed to him and signed by Choo informing that ICP was appointed manager for production and marketing of CEPCO's core business and request that co-operation be extended to ICP. Later, when encountered by ICP staff at CEPCO's office premises requesting for some information, Ang was indignant towards them. By 7 May 1996, he received another letter from CEPCO's company secretary, one Ms Chui Lai Leng (Ms Chui), retrenching him as an employee of the company. Six other key staff of CEPCO met similar fates on the same day.

A board of directors meeting of CEPCO was called on 9 May 1996. The attendees were: Choo (taking the chair), Raja Zainal Abidin, Dato Mustaffa Mohd, Tan Sri Stephen and Ang. In attendance, as secretary, was Ms Chui. What exactly was spoken at this meeting and the resolutions passed are hot topics of contention between the parties in this case. However, all agreed that the principle issue centered on the appointment of ICP to take over the management CEPCO's core business.

According to Choo, at this meeting, the board of CEPCO ractified his decision to appoint ICP to be the manager of production and sales of CEPCO's core business. Tan Sri Stephen and Ang strenuously denied this. They argue that no resolution was ever passed to approve this appointment. They stress that the management agreement containing the terms and condition's of ICP's appointment was not even adduced to the board members at this meeting for consideration. Under such circumstance, they claim that the board could never have rectified the act of Choo to appoint ICP as manager. Further, they stress that the board had even agreed to meet again in two weeks time to discuss a draft management agreement which Choo undertook to tender. According to Tan Sri Stephen, the fixing of the next board meeting in two weeks time was to accommodate his presence since he was going abroad soon after the meeting of 9 May 1996. Thus, no rectification of Choo's acts and authorization of him to sign any agreement with ICP could have occurred. Choo however denies these claims. Though admitting that the management agreement was not tendered at this meeting, such an agreement was only a formality since the board had at this meeting sanctioned his act. To corroborate, Choo points out another resolution passed at this meeting which approved ICP's representatives to be signatories of CEPCO's cheques. He explains that if the appointment of ICP as manager of CEPCO's core business was not approved at this meeting, how could the board pass the motion allowing representatives of ICP to sign CEPCO cheques?

Because of this conflict, it is necessary to disclose in detail what transpired after the 9 May 1996 relating to the minutes of the board meeting. Ms Chui, the company secretary, testified that after this meeting she prepared draft minutes of the meeting. This was handed over to Choo who made extensive amendments thereto by deleting substantial recordings of Tan Sri Stephen's and Ang's protests over ICP's appointment as manager of CEPCO's core business. When Tan Sri Stephen secured a copy of this amended signed minutes approved by Choo at the end of May 1996 he was dissatisfied. Immediately he wrote various letters to Ms Chui

complaining of its accuracies. Ms Chui forwarded these letters to Choo but received no instructions to reply to them. A

On 23 May 1996, a board meeting of CEPCO was called. Those present were: Choo, Dato Mustaffa, and Hamidun. In attendance was Ms Chui. At this meeting, relevant to the issues of this case, the following resolutions were passed: the minutes of the board meeting of 9 May 1996 was confirmed: the resignations of Wong and Ang as directors of the company were accepted. B

While ICP was in control of the management of CEPCO's core business, ICP on 3 June 1996 wrote to the Federation of Malaysian Manufacturers Concrete Products Group ('FMMCPIG'), an association of concrete products producers, tendering CEPCO's resignation from this organization. C

Then, by the early part of June 1996, when the legal documentation pursuant to the instructions given to M/s Adnan, Sundra & Low were ready they were handed over to Choo. It consisted of a management agreement ('management agreement'); a Call & Put Options ('Call & Put Options'): and a sale and purchase agreement for the assets and goodwill of CEPCO's core business ('S&P Agreement'). On 5 June 1996 without reference or approval to the board of CEPCO Choo executed the management agreement for and on behalf of CEPCO. Lim signed for ICP. When this was completed, a press release was forwarded to the local dailies which published such news in their mediums on 8 June 1996 stating that ICP had taken over the management of CEPCO's core business. D E

As the management agreement is the principal item of contention, it is essential to disclose and elaborate some of the terms and conditions contained therein.

Clause 1 authorizes ICP to exclusively manage the production of CEPCO's core business. F

Clause 2 declares that the agreement 'is conditional upon the approval of the Ministry of Trade and Industry ('MITI') being obtained for the provision of the management services by ICP to CEPCO on the terms and conditions acceptable to the parties hereto within a period of twelve months from the date hereof or such other date as may be mutually agreed between the parties ('the cut off date')'. And in the event of this approval not obtained on or before the cut off date, then 'this agreement shall terminate and be null and void and of no effect whatever'. When approval of MITI is obtained, the agreement shall become unconditional and be effective for a period of three years with an option to ICP to renew for another period of three years. G H

Clause 3 not only permits ICP to manage the production division of CEPCO's core business but also to 'market the products', and in so doing is permitted to appoint and dismiss on behalf of CEPCO any staff of CEPCO. I

Clause 5 states that ICP shall undertake to advance a sum not exceeding RM29.2m as working capital to CEPCO interest free and which

sum must be repaid within 30 days upon expiry of the term of the agreement.

Clause 6 specifies the price and quantity of products produced by CEPCO that ICP must purchase during the term of this agreement.

Clause 7 announces the consideration RM50,000 per month as management fees as well as 50% of the 'nett margin of all the products sold' under the terms of this agreement.

Clause 15 entitles ICP to appoint one director to CEPCO's board and as well as a joint company secretary to CEPCO in addition to the existing company secretary.

Clause 16 stipulates that as security for the repayment of the advances to be made by ICP to CEPCO as working capital, CEPCO shall deposit all documents of title of its fixed assets to M/s Adnan, Sundra & Low as stakeholder.

On the same date as the management agreement was signed, Choo for and on behalf of CEPCO executed two other documents: one is a letter of intent ('letter of intent') to ICP declaring that:

> it is our intention to dispose of all our assets pertaining to the manufacturing of spun concrete piles and poles to you, at a firm price of the nett book value of the assets plus a premium of RM1,439,421.56 subject to agreement of terms, a draft of which is annexed hereto.
>
> We also agree that we shall not make any offer to any third party to purchase the said assets until we have made an offer to you and the same is not accepted by you or the terms thereof are not agreed between ourselves,

The other is an implementation letter ('letter of implementation') by CEPCO to ICP which declares that pending the approval of the management agreement by MITI, CEPCO allows ICP to manage the core business of CEPCO on the terms set out therein.

Soon after the execution of these documents, on 15 June 1996, the accounts manager of ICP, one Adrian Leong, visited the office of MITI. He had an interview with one Pn Roslina, the Penolong Pengarah kepada Unit Saham & Koporate of MITI. He inquired on the procedure to apply for MITI's consent for the management agreement. In reply, Pn Roslina told him that such consent was not necessary.

When the outcome of this interview was reported to Lim, a letter dated 25 June 1996 by CEPCO and signed by Choo was sent to MITI. It informed the addressee of the management agreement and declared that there is no change in the equity structure of the companies involved in this exercise. It concluded by expressing a hope that MITI had no objection to the arrangement of the parties in the agreement.

MITI replied to CEPCO on 5 July 1996. It acknowledged what was stated in CEPCO's letter of 25 June 1996.

While all these were going on, Repco Low and associates were unloading their CEPCO shareholdings in the open market. Picking up some of these was Dato Fasir, either in his own name or through nominees.

Then on 2 July 1996, Dato' Fasir decided to purchase from Repco Low and associates the latter's shareholdings in Progressive. To refresh, Progressive was the holding company of Wong that held moratorium shares in CEPCO. Wong sold it to Repco Low and associates in the early part of January 1966. As at the 2 July 1996, Progressive held 9.33% shares in CEPCO.

When this purchase, by way of various sale and purchase agreements, was formalized Choo was present. He handed over to Dato' Fasir a circular resolution of CEPCO dated 5 June 1996. On it Choo, Raja Zainal Abidin and Dato Mustaffa had placed their signatures, indicating their approval of its contents. The other two directors, Tan Sri Stephen and Hamidun, whose names also appear on this resolution, had not signed. But written on top of Tan Sri Stephen's name was the word 'overseas', indicating that he was abroad during this period (a fact denied by Tan Sri Stephen who insists that he was in the country on the date this resolution is dated). Choo requested Dato' Fasir to get Hamidun to execute this circular resolution. The importance of this document is in its contents which states:

> Management Agreement with ICP
> That approval be and is hereby given to the company to enter into a management agreement with Industrial Concrete Products Bhd ('ICP') to appoint ICP as manager of the company's product division for the manufacture, production and marketing of pre-stress spun concrete piles and poles upon the terms and conditions as set out in the said management agreement.
>
> That authority be and is hereby given to Mr Choo Chin Thye to execute the said management agreement on behalf of the company.

Certain factions have seized upon this document to argue that if Choo's action in appointing ICP to be manager of CEPCO's core business had been ractified by the board of CEPCO on 9 May 1996, why was there a necessity for this resolution? In any event, this request was not obliged to since Hamidun refused to sign.

With the purchase of Progressive's shares, Dr Fasir 'discovered' that he had become the controlling shareholder of CEPCO. A board meeting of CEPCO was immediately called on 8 July 1996 and the following resolutions were recorded as passed: The resignations of Choo, Raja Zainal Abidin and Dato' Mustaffa as directors of CEPCO were accepted. Two nominees of Dato' Fasir's: Che Mohd Adib and Dennis Xavier were appointed to the board. A joined company secretary was added. Tan Sri Stephen's version of what transpired at the board meeting held on 9 May 1996 through his various letters of complaint to the company secretary and/or Choo were accepted as the correct versions of the proceedings of that day.

In the next few days, a flurry of activities occurred.

On 9 July 1996, Hamidun in taking the lead role in CEPCO wrote a letter for and on behalf of CEPCO, to MITI announcing that the management agreement between ICP and CEPCO was done without the approval of the board of CEPCO. He requested MITI to delay the

application for approval of this agreement between the parties until the board of CEPCO had examined this matter in detail.

Orders were then given to the staff of CEPCO to prohibit the representatives of ICP from entering the premises of CEPCO to carry out their management duties.

ICP retaliated to all these with two letters. The first was to CEPCO. It referred to the proposed sale of CEPCO assets mentioned in the letter of intent of which ICP now desires to purchase by entering into a sale and purchase agreement on the terms as proposed in the draft sale and purchase agreement attached to the letter of intent.

The next was to the directors of CEPCO. It reveals the interview Adrian Leong had with Pn Roslina who advised that MITI's approval of the management agreement was not necessary. It then declares that:

> Since MITI has now replied to CEPCO's letter on 5 July 1996 by noting the signing of the management agreement, the said agreement is now unconditional … We shall do our best in carrying out our duties and responsibilities in accordance with the terms of the management agreement and look forward to a happy working relationship for the next six years.

Concerned over this, Dato' Fasir and Hamidun went to see Pn Roslina at MITI. Pn Roslina in her testimony recalled that this group claimed that they were cheated and that the management agreement 'does not benefit them'. After consulting her superior, Pn Roslina wrote to CEPCO on 26 July 1996. This letter highlighted condition 'j' in CEPCO's manufacturing licence. It then claimed MITI's earlier letter to CEPCO dated 5 July 1996 is not an approval, and permission from MITI on the agreement could only be considered after CEPCO had submitted a detail application with a directors' resolution on this matter.

In the subsequent days that followed, solicitors' letters from CEPCO and ICP traded accusations and denials of their respective clients. Legal actions were then commenced.

With this summary of the occurrences, I shall now set out the claims of each party.

The plaintiff

The plaintiff in this action is ICP and the defendant is CEPCO. ICP is claiming from CEPCO the following:

1 A declaration that the management agreement is valid and in full force and effect

2 Specific performance of this management agreement.

3 Damages in lieu of and in addition to specific performance.

4 An injunction against the CEPCO from interfering or obstructing ICP from carrying the work as specified in the management agreement.

5 Alternatively damages for breach of contract by CEPCO.

The defendant's (CEPCO) defence and counterclaims

CEPCO's defence to ICP's claim is as follows: Firstly, the management agreement, being a conditional agreement requiring MITI's approval has lapsed and become unenforceable since this condition was not fulfilled within the stipulated time. Secondly, the management agreement does not bind CEPCO as Choo lacked authority, both from the board of Directors and shareholders of CEPCO, to enter into such a contract with ICP for and on behalf of CEPCO, and this was known or ought to have been known by ICP but ICP chose to ignore it.

CEPCO then counterclaimed against ICP. Besides, it also brought in two other defendants: Choo (second defendant to the defendant's counterclaim) and Lim (third defendant to the defendant's counterclaim).

Against ICP, CEPCO counterclaims:

(a) declaration that CEPCO is not bound by the management agreement and/or the letter of intent and each of these are invalid and of no effect;

(b) damages for trespassing into CEPCO's properties;

(c) damages for conspiring with Choo and Lim to wrongfully injure CEPCO;

(d) a sum of RM17,708,856.35 being the cost of goods taken by ICP from CEPCO during the period ICP was managing CEPCO's core business;

(e) the return of all documents including accounts and financial records belonging to CEPCO which were taken by ICP during the period when ICP was managing CEPCO's core business.

Against Choo, CEPCO claims:

(a) for account of profits as well as damages and/or equitable compensation for breach of his fiduciary duty as a director of CEPCO;

(b) damages for conspiring with ICP and Lim in wrongfully with intent to injure CEPCO during the course of the events as described above.

Against Lim:

(a) for account of profits made by Lim in having assisted and/or facilitated and/or participated in Choo's breach of fiduciary duty to CEPCO and/or for equitable compensation as a constructive trustee;

(b) damages for conspiring with ICP and Choo to injure CEPCO.

ICP's defences to these counterclaims by CEPCO are:

1 the management agreement is valid and effective;

2 Choo had actual or ostensible authority to execute the management agreement;

3 in the alternative, CEPCO had acquiesced the acts and conduct of Choo and is thereby estopped from making this claim.

Choo's defence is that he had the authority to enter into the management agreement and, prior to that, the management arrangements with ICP, both of which was for and on behalf of CEPCO.

Lim's defence was that he is not a constructive trustee nor an accessory to Choo's breach of fiduciary duty to CEPCO.

The second defendant to the counterclaim in the original action (Choo) counterclaims against six defendants

Choo counterclaims against six persons. They are firstly CEPCO; secondly Dato' Fasir; thirdly Yusri bin Kamarudin; fourthly, Ruhanie bin Ahmad; fifthly Mohd Adib bin Haji Awang Noh; and sixthly, Datuk Azizul Rahman bin Abdul Aziz. The third to the sixth of these are members of the present board of CEPCO. Choo claims that they are Dato' Fasir's nominees. And being the single largest substantial shareholder of CEPCO, Dato' Fasir is also the controlling mind and deeds of CEPCO. By CEPCO making a counterclaim in the original suit against Choo, when Dato' Fasir had at all material time, knowledge of the existence of the management agreement and agreed to Choo proceeding with it, Dato' Fasir had conspired with those mentioned above to bring a false claim against Choo. For this, Choo is seeking from this court:

1 damages for actionable abuse of process;

2 damages for conspiracy to injure.

Determination of the issue of liability first

Due to the magnitude of damages involved and the time consumed to adduce evidence on it, by consent of all parties, this court shall proceed to decide on the issue of liability first. Assessment of damages if any and against whom shall follow after liability is determined.

Disputes between ICP and CEPCO

With the numerous claims and counterclaims of the parties, it is necessary that this court be focused on the disputes between the parties and approach them in the sequence of their priority in filing.

The first is the contest between ICP and CEPCO. According to the submissions of ICP and CEPCO, the issues involving them are:

Firstly, whether Choo had authority (actual or ostensible) to execute the management agreement for and on behalf of CEPCO?

Secondly, whether the management agreement required the approval of a general meeting of CEPCO as set out in s 132C of the Companies Act 1965 ('the Act')?

Thirdly, if Choo did not have such authority, whether CEPCO had acquiesced to the acts and conduct of Choo, to the extent that CEPCO is estopped from denying that Choo had no such authority?

Fourthly, whether there was trespass by ICP on CEPCO's properties when ICP moved into the premises of CEPCO and took over the management of Cepco's core business?

Fifthly, whether the management agreement was a conditional agreement? If this court finds it is, then whether the condition mentioned in the agreement has been fulfilled?

Sixthly, whether there was conspiracy by ICP with Choo and Lim to defraud CEPCO and, if so, whether ICP had become the constructive trustee of CEPCO for all the profits and benefits of CEPCO's core business during the period when ICP was CEPCO's manager.

Did Choo have authority to execute the management agreement?

A third party (often referred to as the contractor) dealing with an agent can hold the principal of the agent liable for the acts of the agent with the third party, if the third party can establish: (a) the agent had actual authority from the principal to act on his behalf; (b) or that the agent had apparent or ostensible authority to do so — see *Halsbury's Laws of England* (4th Ed) Vol 1 (2), para 135:

> 'Actual authority' is described by Lord Diplock in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 1 ALL ER 630 at p 644 as:
>
> > 'a legal relationship between the principal and agent created by consensual agreement to which they alone are the parties. Its scope is to be ascertained by applying ordinary principles of construction of the contracts, including any proper implications from the express words used, the usage of trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the 'actual' authority, it does create contractual rights and liabilities between the principal and the contractor…' (this principle is adopted by the Federal Court in *Chew Hock San & Ors v Connaught Housing Development Sdn Bhd* [1985] 1 MLJ 350).

Mason CJ in the Australian case of *Northside Development Pty Ltd v Registrar-General & Ors* [1993] All ER 385 at p 402 adds to this with:

> Such 'actual' authority may be conferred by the constitution itself, as, for example, in the case of a company, upon the board of directors, or it may be conferred by those who under the constitution have the powers of management upon some other person whom the constitution permits them to delegate authority to make representations of this kind.

Article 116 of the articles of association ('articles of association') of CEPCO specifies that 'The business of the company shall be managed by the directors'. By this, it must be considered to mean the board of directors ('board') of CEPCO and not a single director. The rational of this approach can be seen from the judgement of Judith Prakash J in *SAL Industrial Leasing Ltd v Hydtrolmech Automation Services Pte Ltd & Ors* [1998] 1 SLR 702:

> In the absence of different provisions in a company's memorandum or articles of association, in general its directors can only exercise powers collectively or collegiately by resolving at the properly convened meetings of the board of directors that act shall be done in the company's name. They are not like

> partners, who have authority to represent the firm individually and to enter into transactions on its behalf for the purpose of carrying on its business in the usual way without the concurrence of their fellow partners …By the general law directors can act on behalf of the company at board meetings at which their collective decisions are expressed by resolutions. They have no powers to act individually as agents for the company. This applies equally to the chairman of the board of directors who is distinguished from other directors only by the fact that he presides at the board meetings.

Choo was only an ordinary director of CEPCO. He had not been appointed by the board to any special position, nor did the board pass any resolution prior to 9 May 1996 to clothe him with any special powers to enter into any arrangement with ICP to take over the management of CEPCO's core business. What he did before this date was entirely his own. Without any mandate from the board, and when the board, who had the right under art 116 of the articles of association of CEPCO to manage the affairs of the company, had not given him any special powers, then Choo did not have actual authority to enter into the management arrangement with ICP.

But then, ICP argues that according to Choo's testimony, Choo has stated that the board of CEPCO had rectified his acts at its meeting on 9 May 1996. Not only this, Choo has proceeded to claim that the board had even authorized him to finalize the management arrangement. These, ICP maintains, are evidence of authorities conferred on Choo by CEPCO's board to execute the management agreement. CEPCO, of course, challenges these assertions. In order to verify such claims, an examination of what transpired at the board meeting on 9 May 1996 is necessary.

From the oral testimonies adduced by the parties concerned, there is a dispute as to what actually took place at the meeting of 9 May 1996. Tan Sri Stephen and Ang, who were at that meeting, deny the assertions of Choo. Ms Chui, not wanting to get involved, decided to take a neutral stand claiming to a substantial part that, she 'could not remember'. Faced with such a conflict of oral testimonies one of the means adopted to determine its accuracy is by referring to and relying on contemporaneous acts and deeds of witnesses to draw reasonable inferences. This approach is adopted by Chang Min Tat J in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 when he said:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly he is a witness with a purpose of this own to serve and if it did not account for the statements in his document and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity…

In this case, such an approach is attractive since soon after the board meeting of 9 May 1996 there were various acts carried out by the parties concerned. Ms Chui had prepared, as she habitually did for all previous board meetings when she was the company secretary, a draft of the minutes

of the meeting. It recorded a detailed account of what took place at the meeting, particularly the protestations by Tan Sri Stephen and Ang. Choo erased all these in his signed copy of the minutes. But soon after this meeting Tan Sri Stephen, even without having sight of the minutes signed by Choo, wrote to Ms Chui to remind her to insert his protests in the minutes. Then after Tan Sri Stephen obtained a copy of Choo's watered down executed minutes he wrote to Ms Chui on two occasions to demand that the records be put right. These letters were shown to Choo who gave no instruction for a formal reply except to say that he would speak to Tan Sri Stephen to resolve this matter. Tan Sri Stephen has denied having received any verbal explanation from Choo. By these revelations, I find that the version as contained in Tan Sri Stephen's letters is more probable. His letters are contemporaneous documents to the events and they correspond in material particulars to Ms Chui's draft. Considering the fact that Tan Sri Stephen was an independent director nominated to the board to safeguard the interest of the minority shareholders of CEPCO, I find him to be more truthful than Choo who had his own agenda. From the accepted version of what took place at this board meeting, there was no dispute that Choo by this time had disclosed to the board that he had agreed to allow ICP to manage the core business of CEPCO. But this does not mean that the board had ratified his acts and agreed to the management agreement. It was agreed at the board meeting on 9 May 1996 that a draft management agreement must be forwarded to the board for consideration before approval. With this as the pre-condition, how could the board sanction Chooi's previous acts and authorize him to execute the management agreement? This pre-condition will also destroy his insistence that the tendering of the management agreement to the board after it was signed was a mere formality. Such perception of Choo is entirely without logic and goes against the very essence of the demand by the board to have sight of this document for perusal, consideration and deliberation before approval.

Choo also relied heavily on the resolution passed on the same day, 9 May 1996, allowing ICP's representatives to be signatories on CEPCO's cheques as an indication that the board had ratified his prior actions and granted him authority to sign the management agreement. On this resolution, Ang vehemently denied that this item was ever brought up. Tan Sri Stephen seems to indicate that he was hoodwinked into passing such a resolution and if he knew that these signatories were that of ICP's officials he would certainly had objected. I believe Tan Sri Stephen. It would be ludicrous and contrary to Tan Sri Stephen's demand for disclosure of the terms of the management agreement before approval by the board and yet agreeing indirectly to allow management to take place first.

Reference was also made by Choo to say that the minutes of the meeting of 9 May 1996 was affirmed by the next board meeting of CEPCO held on 23 May 1996. But with the revelation above, the minutes tendered to this board for confirmation was laced with inaccuracies. Besides no notice was ever sent to Tan Sri Stephen informing him of this gathering. He was in the country at this material time. Under these circumstances, I find the confirmation at this meeting of the previous minutes does not support

any proposition that relevant approval and sanction was granted to Choo by the board to do what he did.

By my reasoning above, I find that the board had not ractified Choo's acts and did not delegate any authority to Choo to execute the management agreement. Therefore, Choo had no actual authority to do what he did.

Did Choo have apparent or ostensible authority to do so?

Having decided that he had no actual authority, I shall now examine whether he had apparent or ostensible authority.

Lord Diplock defines apparent or ostensible authority in the same case of *Freeman & Lockyer v Buckhurst Park Properties (Mangel) Ltd & Anor* [1964] 1 ALL ER 630 as:

> a legal relationship between the principal and the contractor created by representation, made by the principal to the contractor, intended to be and in fact acted on by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any of the obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation. The representation, when acted upon by the contractor by entering into the contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract …

Lord Peason in the same case (*Freeman & Lockyer v Buckhust Park Properties (Mangel) Ltd & Anor*) then speaks of an implied authority which can be characterized as an apparent or ostensible authority in this manner:

> The expression 'ostensible authority' and 'holding out' are somewhat vague. The basis for them, when the situation is analysed, is an estopple by representation. The agent professes to act on behalf of the company, and he thereby impliedly represents and warrants that he has authority from the company to do so…In this case the defendant company has known of and acquiesced in the agent professing to act on its behalf and thereby impliedly representing that he has the company's authority to do so. The company is considered to have made the representation, or caused it to be made, or at any rate to be responsible for it. Accordingly, as against the other contracting party, who has altered his position in reliance on the representation, the company is estopped from denying the truth of the representation. The identification of the persons whose knowledge and acquiescence constitute knowledge and acquiescence by the company depends on the facts of the particular case.

For a contractor to enforce against the principal a contract claiming the agent had apparent or ostensible authority (including implied) to do so on his behalf Lord Diplock in *Freeman*'s case sets out four conditions to be fulfilled. These tests had been accepted as law by Malaysian courts in the case of *Woodland Development Sdn Bhd v Chartered Bank; PJT & Densun (M) Sdn Bhd (Third Party)* [1986] 1 MLJ 84 at p 89. These are:

(1) that a representation that the agent had the authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;

(2) that such representation was made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract relates;

(3) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and

(4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contact of that kind to the agent.

I shall now apply the facts of this case to this test.

The representation that Choo had authority to enter into the management agreement in this case comes mainly from the acts and deeds of Choo himself. He had represented to ICP that he had mandate to represent CEPCO on this matter. Besides this, the acts and deeds of CEPCO's staff and the board itself also contributed to such a representation. The following are instances in support:

Choo was appointed to the board of CEPCO in the early part of 1996. As revealed, he was not conferred with any exclusive powers. He was only an ordinary director of the company. However, giving the impression that he represents the controlling shareholders of CEPCO, the staff and the directors of the company were in deference to him. They referred to him for major decisions relating to the company's affairs. This included Ang, the then most senior executive of the company, as well as a director. Besides being a mandatory signatory of the company's cheques, Choo also chaired all the board meetings of this period. These, in my opinion, made him a de facto executive chairman of CEPCO. Then on 25 April 1996, after agreeing to the terms as set out in Lim's concept paper and giving instructions to the lawyers to prepare the necessary legal documents, Choo accompanied ICP's representatives into CEPCO's headquarters in Kuala Lumpur and allowed ICP to take over the running of CEPCO's core business. Contemporaneous with this act was a letter of instructions by Choo to Ang requiring Ang and all the staff of CEPCO to render full cooperation to ICP to carry out its management activities in CEPCO. This was complied with as reflected by the ability of ICP to carry out their management exercises without any resistance from directors, staff or shareholders of CEPCO. Not long thereafter, Choo signed several letters of dismissal of CEPCO's key staff at the instigation of ICP. Ang also received his letter of dismissal as an employee of CEPCO; a letter signed by Ms Chui on the instruction of Choo. After the board meeting of 9 May 1996 more display of authority by Choo was seen. Choo was able to secure ICP's personnel to be signatories to CEPCO's cheques. To achieve this, approval of the board of CEPCO must have been obtained, reflecting that the board had consented to Choo's action in allowing ICP to manage CEPCO's core business.

With these illustrations, I am of the view that condition one of the test has been complied with.

As regards the second condition, that the representation was made by a person or persons who had actual authority, it must emanate from the board for, as discussed earlier, only the board had actual authority to enter into the management agreement. So did the board of CEPCO make such representation? My answer to this: Yes. The instances are elaborated under the representation made by Choo that he had authority to enter on behalf of CEPCO the management agreement where references of the board's actions and deeds imply that such representations by the board was made. There is no necessity to repeat them.

Relating to the third condition, I find that this has been fulfilled since Lim, representing ICP, had affirmed that ICP had relied on the representation mentioned to enter into the management agreement.

As for the fourth condition, I have to deal with Mr Cecil Abraham's (leading counsel for CEPCO) contention that art 116 of the articles of association of CEPCO does not even allow the board of CEPCO to effect the management agreement. This, he stresses, read in conjunction with s 132C of the Act prohibits disposal of a substantial portion of the company's assets without members' approval at the general meeting of the company. He insists that the management agreement taken together with 'other documents' amounts to a disposal of CEPCO's assets and undertaking of this degree. These 'other documents' referred to by him are: firstly, an earlier sale and purchase agreement dated 24 April 1996 ('memorandum of agreement') signed by CEPCO and ICP for the sale of CEPCO's core business and assets: the Put and Call Options; and the letter of intent of 5 June 1996. The last item has been described but the first two requires some elaboration.

Subsequent to Choo and Lim agreeing to the concept paper, the lawyers initially prepared a sale and purchase agreement where CEPCO will sell its core business and assets to ICP. Choo signed this agreement for and on behalf of CEPCO, and Lim represented ICP. According to Lim, this memorandum of agreement was rescinded by the parties when it was discovered that the time for completion of this sale was too soon to enable Repco Low and his associates to inject the alternative clinker plant business into CEPCO. Without the replacement of a core business within a certain time frame (six months) CEPCO may be delisted by the local stock exchange. The Put and Call Options though prepared by the lawyers at the time of the management agreement was not, according to Lim, executed by the parties who instead elected to make use of the letter of intent for this exercise.

After careful consideration, I am not convinced by this proposition. The reasons are as follows:

Firstly, the terms of the management agreement, without doubt, is restricted to ICP managing the core business of CEPCO with provisions for ICP to purchase a minimum quantity of manufactured products produced by CEPCO. It contains no provision for the disposal of any substantial

portion of CEPCO's undertaking or property, which would naturally affect the performance or financial position of the company. This arrangement, therefore, cannot be considered to fall within the ambit of s 132C of the Act which reads:

> Notwithstanding anything in a company's memorandum or articles, the directors shall not carry into effect any proposal or execute any transaction for —
>
> (a) the acquisition of an undertaking or property of a substantial value; or
>
> (b) the disposal of a substantial portion of the company's undertaking or property, which would materially and adversely affect the performance or financial position of the company, unless the proposal or transaction has been approved by the company in general meeting.

Article 116 of CEPCO's articles of association which provides that the business of the company shall be managed by the directors subject to the qualification that any sale of the company's main undertaking shall be subjected to rectification by shareholders at a general meeting.

Secondly, the memorandum of agreement cannot be considered to form part of the documents to constitute a disposal of a substantial portion of CEPCO's undertaking or property since the parties have rescinded it. This similarly applies to the Put and Call Options; such documents were not even executed. As revealed, these were substituted by the letter of intent. Though this deed speaks of the intention of CEPCO to dispose off its core business, which would certainly have been caught by the provisions of s 132C of the Act and art 116 of the articles of association of CEPCO, it has a proviso which announces that it is 'subject to the agreement of terms, a draft of which is annexed thereto'. And in the draft agreement that was attached, there is a clause which requires 'the approval of the shareholders of the purchaser (ICP) and the vendor (CEPCO) to the sale and purchase of the assets'. This letter of intent therefore cannot be considered as an instrument to effect a disposal of the substantial assets of CEPCO.

Finally, having considered the legal implication of each of the documents referred, I find no indication of these having contravened the cited provisions of the Act and the articles of association of CEPCO.

With the board possessed of authority to enter into the management agreement without contravening the M&A, as well as the law, condition four of the test is complied with.

Having fulfilled all the four conditions set out in the test, I have to return a finding that Choo had apparent or ostensible (including implied) authority from CEPCO to enter into the management agreement.

Refusing to concede, Mr Cecil Abraham attempted to convince me in his submission that such apparent or ostensible authority would not apply if ICP had knowledge that Choo had no authority to enter into the management agreement. This knowledge includes failure to inquire. In support he relied on the exceptions to *Turquand*'s rule, a legal concept accepted in our Malaysian court through the Federal Court judgment of

A *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & 12 Ors* [1998] 1 AMR 169.

Turquand's rule is derived from the judgment in *Royal British Bank v Turquand* (1856) 119 ER 474. It provides protection to outsiders dealing with a company in good faith to assume that the acts of the company relied on were properly done within its constitution and its powers; thus the outsider is not bound to inquire whether acts of internal management have been regular. As Edgar Joseph Jr FCJ (as he then was) in the Federal Court decision of *Pekan Nenas*'s case explains, this rule is to 'promote business convenience'. However, this principle is not without exceptions. It cannot be invoked by an outsider who knows or ought to know that there is an irregularity — see the judgement in *Pekan Nenas*' case.

After careful perusal of the cases cited on this point, I find that counsel for CEPCO may have missed out a vital part of *Turquand*'s rule. At p 207 of the citation in *Pekan Nenas*'s case, Edgar Joseph Jr FCJ has this to remind:

> We need hardly add that the rule in *Turquand*'s case is designed to protect not the company itself, but the persons dealing with the company. It follows that there is no reason why persons, including outsiders, who entered into transactions with a company, and who are sued should not invoke the benefit of the Rule, as a defence.

But in this case ICP has not relied on *Turquand*'s rule as a defence. CEPCO desires to make use of it to defeat ICP's claim. But the law does not permit this.

Does the management agreement require the approval of the members of CEPCO at a general meeting?

On the next question of whether the management agreement requires the approval of members of CEPCO at a general meeting as set out in s 132C of the Act, I have answered. There is no necessity to repeat except to record that it is in the negative.

Did CEPCO acquiesce to Choo's acts and conducts?

Having decided that Choo displayed apparent or ostensible authority to enter into the management agreement there is no necessity for this court to proceed to analyze whether CEPCO had acquiesced to Choo's acts and conduct which estopped CEPCO from denying that Choo had no authority to do so. To a degree this matter has already been discussed under the issue of apparent or ostensible authority.

Did ICP trespass on CEPCO's properties when ICP moved into the premises of CEPCO and took over the management of CEPCO's core business?

Once this court finds that Choo had authority to enter into the management agreement for the purposes of attaching liability to the principal for the acts

of his agent, as acknowledged by Mr Cecil Abraham, the issues relating to trespass by ICP on CEPCO's properties would be a non-issue. With this, I find that ICP was not a trespasser on CEPCO's properties.

Did ICP conspired with Lim and Choo to defraud CEPCO resulting in ICP being a constructive trustee of CEPCO for all the profits and benefits of CEPCO's core business during the period when ICP was its manager?

To decide on this, one must consider the legal position of Choo and Lim. As this would be dealt with later, I will attend to this issue at the same time when the position of Choo and Lim is discussed.

Is the management agreement a conditional agreement?

The next question for this court to decide concerns the terms of the management agreement. Clause 2 therein is straightforward and unambiguous. It expressly specifies that this agreement 'is conditional upon the Ministry of International Trade and Industry ('MITI') being obtained for the provision of the management services by ICP to CEPCO on terms and conditions acceptable to the parties hereto within a period of 12 months from the date hereof.'

Has the condition been fulfilled?

CEPCO contents that this condition has not received the approval of MITI till today. Thus, by effuxion of time (12 months from date of agreement to obtain such approval) this management agreement is terminated in accordance to cl 2.2 and has become 'null and void and of no effect'.

ICP, however, retaliates by referring to the oral conversation Pn Roslina had with Adrian Leong on 15 June 1996, where the former informed the latter that in such management arrangements between the parties, where no equity alterations are involved, approval from MITI is not required. In fact Pn Roslina confirms this in her oral testimony before this court. She also states that it was MITI's style in replying to any application which is not necessary with just an acknowledgement in the form of MITI's letter dated 5 July 1996. Relying on this, ICP argues that since there is no necessity for such approval, both ICP and CEPCO must be under a mistaken apprehension in making the management agreement conditional upon such approval. When this occurred, the management agreement became unconditional and consequently enforceable against CEPCO. Alternatively, if approval is required, MITI's letter of acknowledgement dated 5 July 1996 must be considered as an approval. In a further alternative, Mr Siew, leading counsel for ICP, submits that if there was no approval given by MITI, the management agreement still subsists. It is not effected by the effuxion of time because CEPCO had wrongfully terminated it by wilfully refusing to proceed with the supply of information and materials requested by MITI in MITI's letter dated 12 July 1996.

In the course of the argument, great stress was laid on condition 'j' in the manufacturing license issued by MITI to CEPCO where MITI's

approval was required for certain changes in CEPCO's activities. Both parties have sought to persuade me to use either the Bahasa Malaysia or English version of the license depending on which version is advantageous to them. If the English text is to be considered then a change of management in CEPCO may require the approval of MITI. The Bahasa Malaysia account seems to indicate otherwise.

After careful consideration, I am of the following views:

Firstly, I do not think that there should be a dispute as to which version of the manufacturing license should be used. Pn Roslina has confirmed that MITI, the issuing authority of the license, only grants such licenses in Bahasa Malaysia. But according to her experience what normally happens is the licencee will make its own English translation of the terms stated in the licence. But this practice is not official. It seems to accommodate a licencee who is not proficient in Bahasa Malaysia and desires to have an English translation for his own consumption. But to me, when the license itself is in Bahasa Malaysia, then this must be accepted as the official text to be used for consideration in this case.

Secondly, though a management arrangement may require the approval of MITI under condition 'j' of the licence, but nowhere in the management agreement is listed the requirement for this approval to be based on condition 'j' or any other conditions in the licence. Clause 2 of the management agreement merely specifies that an approval from MITI is a condition precedent to make this agreement effective. Thus, I find that it is irrelevant to refer to or rely on the terms of this licence to determine whether the arrangement entered between the parties requires the approval from MITI.

Thirdly, when an approval from MITI is required, then it is up to MITI to decide whether to grant or refuse it. An acknowledgement in the fashion set out in MITI's letter of 5 July 1996 is neither an approval nor a rejection. Similarly with the views of Pn Roslina, who maintains that such an approval was not necessary. Not necessary does not mean approval. In fact this is reiterated in MITI's subsequent letter to CEPCO dated 12 July 1996.

Fourthly, I do not find the existence of any mistake perpetuated by the parties when they insisted on the approval of MITI as a condition precedent in the management agreement. As discussed, the licence has nothing to do with the application for approval. The basis on how MITI exercises its discretion in granting or rejecting such an approval was not 'a matter of fact essential to the agreement' at the time of entering into this agreement. As such no mistake was perpetuated to give effect to the remedies provided for under the Contracts Act.

Fifthly, as to the last submission of Mr Siew on CEPCO's willful breach of the management agreement by refusing to supply further information and material for MITI to process the application for approval, I find that this is never raised in the pleadings. This allegation has not been particularized as an item of breach in ICP's statement of claim. When it is not pleaded, then it is trite law that it cannot be considered.

By the reasons aforesaid, I find that since MITI's approval has not been obtained, the condition precedent of the management agreement is not fulfilled to give effect to the contract. And by effuxion of time, this agreement has lapsed.

Dispute between CEPCO and Choo

In the dispute between CEPCO and Choo, three issues require consideration. The first is: whether Choo, as a director of CEPCO, had breached his fiduciary duty to CEPCO. If he did, then is he liable to CEPCO, as a trustee, to account for all benefits and profits derived therefrom. Thirdly: did Choo conspire with Lim and ICP to injure CEPCO? I shall deal with the first two questions. The third, I shall leave it for consideration after I have dealt with the differences between CEPCO and Lim.

Breach of fiduciary duty

The first issue arose out of CEPCO's allegation that Choo, by his acts and deeds, while acting as a director of CEPCO, in securing ICP management of CEPCO's core business, had committed a breach of fiduciary duty to CEPCO. To decide whether Choo has breached his fiduciary duty, the following factors need to be considered.

Firstly, it must be accepted that the primary duty of a director is his allegiance to the company except, if he, as a nominated director and where there is no conflict of interest, then he may take into account the interest of his principal — see the case of *Kumagai Gumi Co Ltd v Zenecon Pte Ltd & Ors* [1995] 2 SLR 297. Towards this, 'a director shall at all times act honestly and use reasonable diligence in the discharge of his duty of his office' and this is 'in addition to and not in derogation of any other written law or rule of law relating to duty or liability of directors or officers of a company.' — s 132 of the Act.

Regarding the extent of the meaning of 'honesty', the case of *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors* [1994] 2 SLR 282 explains that this does not mean that the director had acted fraudulently; it means that he must act bona fide in the interests of the company and that in exercising his discretion, the director should act only to promote and advance the interest of the company. Elaborating on this, Cohen J of the New South Wales Supreme Court in the case of *Blackwell v Moray* [1991] 5 ACSR 255, expresses that:

> A mere general sense of honesty of purpose is not in my view sufficient to satisfy the requirements that a director act bona fide for the benefit of the company. It requires at least a consideration of the views or of relevant material in order that he may act in a bona fide way. The abandonment of any proper consideration of relevant facts, the admitted failure to exercise an independent discretion and the mere doing of what was thought that the majority shareholder wanted cannot in these circumstances have amounted to the bona fide exercise of discretion required of a director.

Judith Prakash J in Singapore High Court case of *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1997] 3 SLR 802 at p 847, followed this up with:

> the abandonment of any proper relevant consideration of relevant facts; the fact of being rushed into a meeting; ignorance and the lack of detailed explanation of the implication of the issues under consideration; failure to exercise an independent discretion and the mere doing of what was thought a third party wanted cannot amount to the bona fide exercise of a director's discretion.

Having set out the factors, I shall proceed to analyze the facts.

Choo declared that he was appointed to the board of CEPCO as a nominee of Repco Low and his associates. This group, he says, were the controlling shareholders of CEPCO at that material time. Though he may command sufficient votes at board meetings of the company to influence any decision favourable to his principal to achieve their objectives, but his primary duty required under the law must still be to act bona fide in the interests of CEPCO. It is only when there is no conflict of interest may he consider the interests of his principal. Here without the consent of the board, Choo commenced negotiations with ICP. Besides, he even agreed to the terms in the concept paper of Lim, which allows ICP to initially manage the core business of CEPCO and then to subsequently purchase the entire set up. On his own, Choo then proceeded to instruct lawyers to prepare the legal documentation to this effect. While this was still under preparation, he allowed ICP to enter CEPCO's core business premises and take over total control of CEPCO's principle trade. Then, without allowing the board of CEPCO to have sight of the management agreement, despite his undertaking to do so at the next meeting, he arbitrarily signed this agreement with ICP. Together with this agreement he also executed, without the board's express approval, the letter of intent and the letter of implementation. Following this, he applied to MITI for consent to the management agreement. Are all these done bona fide in the interests of CEPCO?

I do not believe so. As disclosed from the unchallenged evidence of Tan Sri Stephen, the core business of CEPCO was running very well. It was making a profit with secured future contracts for its goods. There is no evidence that it was suffering cash flow problems to warrant a necessity for the injection of working capital from an external source. In fact, as disclosed by Dato Fasir, CEPCO was flushed with funds by a recent rights issue exercise. As for the managements know how, though Wong had resigned as the managing director, there was still Ang, who was already in the management of the company's core business. Under these comfortable circumstances why was there a necessity to call in ICP in such haste to manage and then sell off the entire core venture of the company?

Towards these, Choo offered the following explanation. Firstly, he said that this scheme fitted into Repco Low's and associates' corporate plan which was to replace the core business of CEPCO with the clinker plant from Sabah. This plan, he said, was made known to the members of the board. But I find no evidence that it was made formally and neither did the

board ever adopt it. Further, I cannot comprehend how this plan could have benefited CEPCO. From the brief description of how it works this exercise amounted to a reverse takeover by the purported owner of the clinker plant of CEPCO. In simple terms, this means that the sale of a listing vehicle, which normally, in our market condition, brings enormous immediate benefit to the controlling shareholders, since such sale, attracts substantial premiums. Though other shareholders may tag along by usually a general offer but for investors who base their investments on the strength of the original business of the company they will lose the benefit of an investment in a kind of business they have faith in. In any event, such a program must have the approval of a general meeting, which was never held. But Choo had already taken steps to implement it. Is this not a case of impetuosity and abandonment of proper consideration of relevant facts?

By the lack of precise and detailed framework of the corporate plan and the non disclosure of detailed effort to introduce this reverse takeover exercise, I am suspicious whether this plan was just a set up invented by Choo's principal, with Choo having full knowledge and participating in it, to stimulate market interest in CEPCO's share to give sufficient leverage to manipulate for enormous financial gains. This can be seen by the substantial rise in the price of CEPCO's share during this period, the fizzling out of this reverse takeover proposal and the disposal of Repco Low's and associate's controlling interest immediately before such plans could see the light of day. I believe that once they reaped their benefit they just left the scene leaving others to pick up the carcasses. But while in control of CEPCO, Choo proceeded to run the entire company as if he ownsed it with total disregard for the board and all other shareholders, except for the group he represented. This is certainly in conflict with his duty to the company and that of the interests of his principal.

Choo's next explanation was that he needed ICP to manage CEPCO's core business urgently because of Ang's threat to resign from the company and encouraging other key personnel to do likewise after Ang and Wong's management buy out was rejected by Choo in preference of ICP's proposal. This he said would cripple CEPCO's core business.

I find flaws in this argument. Firstly, there was never any proper evaluation of ICP's proposal and that of Ang/Wongs' management buy out. Though Choo claimed that he had obtained Tay Way Bok's view which favoured ICP's proposal, I do not believe that this broker had sufficient skill and knowledge to evaluate the two offers. Secondly, even if Ang had threatened to resign and Wong was medically unfit to help out, there was no justification in inviting ICP to take over management without the board's approval and without the management agreement signed. At worse, the production and sale of CEPCO's core business products may be delayed and held up but this would be temporary. The company would not collapse. During this brief period, proper evaluation of ICP's proposal as well as other remedies may be considered to overcome such crises. There was just no necessity for such haste to welcome CEPCO's archival.

Choo argued that the board of CEPCO had ractified his action at its meeting on 9 May 1996. But as I have ruled in the earlier part of this judgment, no such approval was ever given.

From the above, I find that Choo had not acted bona fide in the interest of CEPCO and neither did he promote and advance CEPCO's interest nor considered the relevant facts before committing the acts as alleged. His entire action throughout this period as a director was solely towards the benefit and interest of the group that nominated him to the board. Such interest not only conflicted with those of CEPCO, but was also disastrous to CEPCO. Its assets were nearly stripped and its core business was on the verge of being annexed by its main competitor. For this, Choo is guilty of CEPCO's accusation of being in breach of his fiduciary duty.

Is Choo, as trustee, liable to account to CEPCO for all benefits and profits deprived from his breach of his fiduciary duty?

Having breached his fiduciary duty to CEPCO, the next question is whether Choo is liable as a trustee of CEPCO to account to CEPCO for all benefits and profits derived from this breach?

A limited company is not a trustee of its own funds and assets; it is its beneficial owner. But its directors, in consequence of the fiduciary character of their duties of the company, are treated as if they are the trustees of the funds and assets of the company, since these are under their control. If the directors breached their duties, like dealing with the funds and assets in a manner which was beyond their power, then as to that dealing, they are treated as having committed a breach of trust and have to account to the company for it — see the judgment of Kay LJ in *Re Land Allotment Co* (1894) 1 Ch 616 and cited in *Belmont Finance Corp v William Furniture Ltd (No 2)* [1980] 1 All ER 393 at p 405.

In this case, Choo had acted beyond his power as a director of CEPCO in dealing with the company's assets and thus had committed a breach of trust to CEPCO. For this, he is liable to account to CEPCO of all benefits and profits derived from this breach.

Differences between CEPCO and Lim

CEPCO's claim against Lim involves two causes of actions: The first is for breach of constructive trust in assisting and/or facilitating and/or participating in Choo's breach of fiduciary duty to CEPCO. The second is for conspiring with Choo and ICP to injure CEPCO.

As constructive trustee

In CEPCO's counterclaim against Lim and ICP it was pleaded that these two parties, as constructive trustees, assisted and/or facilitated and/or participated in Choo's breach of fiduciary duty to CEPCO. To attribute liability to both these defendants, CEPCO claims that Lim and ICP (through Lim as managing director of ICP) had actual and constructive knowledge of Choo's breach. This knowledge extends to wilfully shutting

one's eye to the obvious and/or refusal to draw the obvious inferences or make the obvious inquires. For these, both Lim and ICP have to account to CEPCO for the benefits and profits derived from Choo's breach of his duty.

The law

This claim for breach of constructive trusteeship has its origins from the much quoted dictum of Lord Selbourne LC in the case of *Barnes v Andy* (1874) LR 9 Ch App 244 which declares:

> That responsibility (of a trustee) may no doubt be extended in equity to others who are not properly trustees, if they are found … actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But … strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

Arising from this, two situations where a third party may become liable in equity are apparent. The first is commonly known as 'knowing receipt', as distinct from the second where liability arises from 'knowing assistance'. The difference is best explained by Lord Nicholls of Bickenhead in the Privy Council case of *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming* [1995] 3 MLJ 74 at p 77 as:

> Stated even more shortly, the first limb of Lord Selbourne LC's formulation is concerned with the liability of a person as a recipient of trust property or its traceable proceeds. The second limb is concerned with what, for want of better compendious description, can be called the liability of an accessory to a trustee's breach of trust. Liability as an accessory is not dependent upon receipt of trust property. It arises even though no trust property has reached the hands of the accessory. It is a form of a secondary liability in the sense that it only arises where there has been a breach of trust.

Since there are two limbs to this cause of action, Mr Teh Boon Eng, counsel for Lim, in the initial part of his submission, points out that by the manner of CEPCO's claim against Lim and ICP as contained in CEPCO's counterclaim, only the second limb is relied on. CEPCO however retorts that it covers both. After perusing the relevant pleadings, I am inclined to adopt the view of Mr Teh. Paragraphs 68 and 69 of CEPCO's counterclaim specifically states that both Lim and ICP, by their conduct had 'assisted and/or facilitated and/or participated in Choo's breaches of his fiduciary duties…'. To me these terms are clear accusations of Lim and ICP being accessories to Choo's misdeeds. This falls squarely within the ambit of the second limb — 'knowing assistance' or 'the accessory liability'. Thus, analysis of this issue must be restricted within the parameters of the second limb.

To succeed in this claim, CEPCO has to establish two elements: The first is whether Choo has breached his fiduciary duty towards CEPCO. The second is whether Lim and ICP had the type of knowledge within the

meaning of the second limb — 'knowing assistance' or 'the accessory liability'.

As for the first, this court has made its finding in the positive. For the second, I find, from CEPCO's initial submission, that CEPCO is confused as to the test to be applied to determine knowledge of the defendants to constitute this liability. CEPCO was citing principles expounded by Gibson J in *Barden Delvaux & Lecuit v Societe Generale* [1992] 4 All ER 385 (commonly referred to as the *Barden*'s case) to distinguish the five different mental states of a defendant to constitute knowledge to qualify for the second limb. But this proposition is already pronounced by the Privy Council in the *Royal Brunei*'s case as being inapplicable. Lord Nicholls in that case at p 87 declares:

> 'Knowingly' is better avoided as a defining ingredient of the principle, and in the context of this principle the Barden scale of knowledge is best forgotten. Then what is the touchstone of this liability in respect of the knowledge element? After an exhaustive evaluation of all the authorities, the *Royal Brunei*'s judgement concludes in this manner:
>
> Drawing the threads together, their Lordships' overall conclusion is that dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient. A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation.

Lord Nicholls (in the same case) elaborates 'honesty' in this fashion:

> Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated … . Carelessness is not dishonesty. Thus for most part dishonesty is to be equated with the conscious impropriety …
>
> However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitute honest conduct is not subjective. Honesty is not an operational scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.
>
> In most situations, there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good reason or compelling reasons, an honest persons does not participate in a transaction if he knows it involves a misappropriation of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not asked questions, lest he learned something he would rather not know, and then proceed regardless.

Answering questions on whether 'taking of risk' constitutes dishonesty, Lord Nicholls pronounces:

> The only answer to these questions lies in keeping in mind that honesty is an objective standard. The individual is expected to attain the standard which

> would be observed by an honest person placed in those circumstances. It is impossible to be more specific… Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might asked further questions. He might seek advice, or insist on further advice being obtained. He might advice the trustee of the risk but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct.

Analysis

From the evidence adduced in this case, I do not find Lim, and consequently ICP (for Lim's actions, deeds and thoughts are attributed to ICP), to be dishonest in their dealings in this transaction. Going by the chronology of events, neither Lim nor ICP approached Choo to manage or purchase the core business of CEPCO. The advances came from Tay Way Bok, an agent of Choo and his principal, Repco Low and associates. Hearing from the commercial market and being informed by Tay Way Bok that Repco Low's group had taken over the controlling interest in CEPCO and whose desire was to carry out a reverse takeover of the company, and being supplied with financial status of CEPCO's core business by Tay Way Bok, it is not unusual and unnatural of Lim, who is in the same line of business as CEPCO's, to respond positively to Choo's proposals. Though not doubting that Lim was interested in merging the businesses of the two companies, CEPCO has accused Lim of not demanding from Choo, during negotiations, Choo's authority to represent CEPCO. Nor did Lim take the trouble to inspect the memorandum and articles of association ('the M&A') of CEPCO to determine the extent of Choo's authority. To this, Lim retorted that it was not polite to make such requests nor was it the commercial practice to inspect the M&A of CEPCO since Choo appeared to have apparent authority.

I accept that such an approach as being the norm in our local social condition. One does not demand from a formidable counter part whom you have heard from your market information that he had just secured control of a public listed company to have sight of his company's M&A or, for that matter, a board or members' resolutions delegating him with such authority during negotiations. It is more convenient and practical to rely on whether his promises made during negotiations can be delivered. On this score, I wish to remind that one must not loose sight of the fact that commercial people are not lawyers. Lawyers are well verse in the law and whose discipline is to be on a constant lookout for every eventuality. A businessman's normal approach is that if you have the goods to sell, please

show them to me, and if they suits my purpose, with the right price I shall purchase them, unless there are circumstances which arises my suspicion that you have obtained the goods by unlawful means. In this case, Choo was able to deliver all his undertakings, principally — to lead, without any opposition, Lim and his team of ICP personnel into the premises of CEPCO's core business and to permit them to operate without interference.

There was no untoward incidence to warrant any suspicion that what Choo did was in breach of his fiduciary duty. Though Lim was informed by Choo that there were 'fireworks' at the board meeting of CEPCO on 9 May 1996, I do not think that this should create or arises any suspicion that Choo had committed a breach of his fiduciary duty. Aggressive board meetings are not uncommon in a company that had just undergone a change and whose management of the core business would be affected. But in this case, despite of the 'fireworks', Choo was able to secure for ICP's representatives to be signatories of CEPCO's cheques. Though, as I have ruled that certain board members were hoodwinked into this, but to Lim and ICP, the outsiders, this does not reflect a breach of fiduciary duty on Choo's part. In fact, it even enhanced Choo's image that he had power delegated to him by the board to transact this deal with ICP.

Another area in which CEPCO felt that Lim and ICP should have investigated on the authority of Choo was that this deal involved the sale of substantial assets of CEPCO which require members' approvals under s 132C of the Act. But, as comprehensively discussed, at this stage, where only the management of CEPCO's core business was involved, such approval was not necessary. Such approval was only required when the assets were purchased by ICP, and this was accommodated in the draft sale and purchase agreement attached to the letter of intent.

Based on the above and keeping in mind that honesty is an objective standard with subjective elements, I find that Lim, and consequently ICP, was not dishonest and, as such, had not committed any breach of constructive trust accused of. For this, CEPCO's claims against both Lim and ICP on this cause of action must fail.

Conspiracy

The second claim of CEPCO against Lim is for conspiring with Choo and ICP to injure CEPCO. In order for this claim to succeed, CEPCO must establish:

> (a) a combination of the defendants; (b) to effect an unlawful purpose; (c) resulting to the damage to the plaintiff (*Crofter Hand Woven Harris Tweed Co Ltd v Veitch* per Lord Simon LC). The classic definition of conspiracy is that in *Mulcahy v R*:
>
> > A conspiracy consists not merely of the intention of two or more, but in agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.
>
> I have used the word 'combination' rather than the word 'agreement' used in that definition and by Lord Simon LC, because the word 'agreement' in this

> context does not mean an agreement in any contractual sense but a combination and common intention to do the act which is the object of the alleged conspiracy.'— per Buckley LJ in *Belmont Finance v Williams Furniture (No 2)* [1980] 1 All ER 393 at p 403.

Thus, in the tort of conspiracy there must be an agreement or 'combination' of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means, resulting in damage to the plaintiff.

According to CEPCO, the unlawful purpose was, as far as Choo was concerned, to strip and sell the assets of CEPCO without obtaining the shareholder's and board of directors' approval, thereby contravening s 132C of the Act. Besides this, the other unlawful purpose cited was to allow ICP to enter into the premises of CEPCO without CEPCO's board's approval or prior to the approval by MITI, and there to seize CEPCO's confidential information followed by the retransferring of CEPCO's customers to ICP, thereby crippling CEPCO entire marketing operation. As for the element of 'agreement' or 'combination' CEPCO insisted that this was found in the consent by ICP and Lim with Choo to the series of documents: the concept paper of Lim, the memorandum of sale, the management agreement, the put and call options, the letter of implementation and the letter of intent; all of which were supposed to encompass the corporate plan. And as a result of the above, CEPCO maintains that it has suffered injuries.

Undoubtedly, there was an agreement by ICP, through Lim, to ultimately purchase the core business and its assets from CEPCO. But was there any common intention on the part of Lim and ICP to strip and sell the assets of CEPCO without the approval of its members and board? Or for that matter, enter into the premises of CEPCO and cripple its marketing department of its core business without the consent of CEPCO's board or the prior approval of MITI? For the former, I find no such common intention existing in Lim and ICP. Though, as stated, there was the intention of Lim, and consequently ICP, to purchase the core business and assets of CEPCO but it was to be subjected to the approval of the relevant bodies. There was nothing sinister in the concept paper, which, to me, contains a business proposition. Then the memorandum of sale followed, but this was aborted; so was the Call & Put Options. The letter of intent was accompanied with a draft sale and purchase agreement which contained terms requiring consent and approval of CEPCO's members. As for the management agreement, this only permitted ICP to manage the core business of CEPCO. And the letter of implementation allowed ICP to enter and manage the core business prior to the consent from MITI as is provided for under the management agreement. From the effective documents (as distinguished from those aborted), I find no intention of the parties to by-pass the members of CEPCO as regards to the sale of CEPCO's assets. As for the board's approval for these activities, I have elaborated extensively on the reliance on Choo's apparent authority by Lim and ICP to enter into this transaction. Then, in the course of management, to economize, synergize, and to be cost effective and competitive, the perusal of CEPCO's core business documents, the reduction of a duplicate marketing force, as well as

channelling some of CEPCO's orders to ICP are totally acceptable commercial approaches. As for entry into CEPCO's premises, prior to the management agreement, there was the invitation by Choo who had apparent authority from CEPCO's board to do so, and subsequent to this agreement, pending the approval of MITI, there was the letter of implementation. With these, I find there existed, no common intention between Lim and ICP on the one hand, with Choo to effect any unlawful purpose or to do a lawful act by unlawful means resulting in injuries to CEPCO. Choo possessed an unlawful purpose and/or did a lawful act by unlawful means but this was not shared by Lim or ICP. They (Lim and ICP) entered into this transaction primarily as a business venture which they felt was advantageous and beneficial to their own commercial concern. This is entirely acceptable since they are men of commerce.

Choo's counterclaim to the counterclaim against the six defendants and CEPCO

In Choo's counterclaim to the counterclaim against the sixth defendants and CEPCO, there are two causes of action. The first is: actionable abuse of process and the second: conspiracy among those defendants to bring a false claim against Choo.

Abuse of process

I shall commence with the cause of action of abuse of process. This cause of action, with initial scepticism (see the case of *Gasing Heights Sdn Bhd v Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695), has now been accepted in our Malaysian common law with the Court of Appeal decision of *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 AMR 1666. Thus,

> when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed (*Re Majory* (1955) Ch 600, at pp 623–624) or some collateral advantage beyond what the law offers (*Goldsmith v Sperring Ltd* [1977] 1 WLR at pp 498–499; see also *Varawa* (1011) 13 CLR, at p 91)

then a cause of action is founded. To qualify, Gopal Sri Ram J (as he then was) in the said case sets out the essential elements of this tort:

> (1) The process complained of must be initiated;
>
> (2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process;
>
> (3) The plaintiff must have suffered some damage or injury in consequence.

In this instance, the process, in the manner of the counterclaim against Choo by CEPCO, has been initiated. The next element Choo has to prove is that CEPCO, under the direction of Dato Fasir as the controlling shareholder of CEPCO, had initiated this claim with a collateral dominant purpose other than to obtain genuine redress which the claim offers. The

collateral dominant purpose, as alleged by Choo, was the bringing of a claim against him by CEPCO with the intention of avoiding liability and/or to cause Choo injury. But this is not true. CEPCO had successfully prosecuted Choo for breach of fiduciary duty. That was the dominant purpose of the action against Choo and this action was duly concluded. It did not use the claim for the dominant collateral purpose as accused of by Choo. For this, Choo's claim against these defendants must fail.

Conspiracy

For the second cause of action of a conspiracy by CEPCO and the six defendants to bring a false claim, the same principles as those amplified in the earlier part of this judgement relating to conspiracy applies. There is no necessity to repeat them once again. In this instance, since there is no abuse of process in this case, the defendants cannot be charged for agreeing with intention to do an unlawful act or to do a lawful act by unlawful means. There was just no unlawful act or lawful act by unlawful means complained of.

Findings

Accordingly, I hereby find as follows:

1 In ICP's action against CEPCO all ICP's claims fail with cost.s

2 In CEPCO's counterclaim against ICP, the following are allowed with cost:

(a) A declaration that CEPCO is not bound by the management agreement and/or letter of intent and each of these are invalid and of no effect.

(b) The return of all documents including accounts and financial records belonging to CEPCO which were taken by ICP during the period when ICP was managing CEPCO's core business.

(c) As for the claim of RM17,708,856.35 for goods taken by ICP from CEPCO during the period when ICP was manager, this needs to be assessed.

3 CEPCO's counterclaim against Choo for accounts of profits as well as damages and/or compensation for breach of his fiduciary duty is allowed with costs and this is to be assessed.

4 CEPCO's counterclaim against Lim for damages and/or compensation for breach of constructive trusteeship and conspiracy is dismissed with costs.

5 Choo's counterclaim to the counterclaim against CEPCO and other five defendants is dismissed with costs.

Order accordingly.

Reported by Jafisah Jaafar